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2
3 IN THE UNITED STATES DISTRICT COURT
4
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
6

7 UNITED STATES OF AMERICA,

No. CR 08-0730 WHA

8 Plaintiff,

9 v.

**TENTATIVE PROTECTIVE
ORDER FOR WITNESS
SECURITY**

10 IVAN CERNA, et al.,

11 Defendants.
12 _____/

13 As discussed at the June 24 hearing, the Court's tentative protective order for this case
14 follows. The parties shall meet and confer regarding this order and submit a joint report by
15 **JULY 8, 2009, AT NOON**, identifying any remaining areas of disagreement. A final protective
16 order shall then be framed. Counsel shall also advise how to conform the deadlines at the end
17 of this order to best fit the December 11 deadline in the final scheduling order.

18 * * *

19 With modifications, the government's motion for a protective order (Dkt. No. 324) is
20 **GRANTED**. Pursuant to Rule 16(d)(1), a protective order is needed to protect witnesses and their
21 families from retaliation for cooperation with law enforcement. *Ex parte*, as authorized by the
22 rule, the government has made a satisfactory showing of good cause on a witness-by-witness
23 basis. The proposed protective order is patterned after the Court's own order in the *Fort* case.
24 The government's proposed modifications thereto are too restrictive, however, and will not be
25 accepted in full. All defense objections are overruled for the reasons stated in the government's
26 reply memorandum.

27 The purpose of this order is to establish a procedure for protecting the identities and/or
28 locations of civilian witnesses who have provided information to law enforcement and whose
names and/or locations appear in Government materials discoverable by the defense or received

1 by the defense pursuant to subpoena or other means. This order does not address what materials
2 are discoverable. That is left to other rulings. Rather, this order sets in place a procedure for
3 the safekeeping of identities and locations of such persons revealed in otherwise discoverable
4 materials, materials received through subpoena, or through any other means. Although most
5 provisions herein apply only to those defense teams electing to receive protected information or
6 in possession of protected information obtained through subpoena or other means, a few
7 important provisions apply to *all* defense teams, so all counsel and investigators must read this
8 order.

9 1. A subject of this protective order is “identifying information.” This term includes the
10 true name, nickname, street name, alias, age, gender, physical description, family, relatives,
11 residence address, residence block, residence street, residence building, phone number, email
12 address, workplace, Social Security Number, driver license number, automobile, automobile
13 registration, credit card information and any other information suggesting the identity and/or
14 location of an individual or his or her family. The term “locator” information or data refers to
15 any of the foregoing other than the true name, nickname, street name and alias. The term
16 “potential trial witness” includes any civilian who has provided information to law enforcement
17 as revealed by materials produced in discovery, obtained by subpoena, or obtained or learned by
18 any other means. “Protected information” includes any identifying information for potential
19 trial witnesses, any locator information, and any information learned about them *from any*
20 *source*. The term “primary witnesses” means those potential trial witnesses shown by the
21 Government to be at heightened risk. The term “secondary witnesses” means all other potential
22 trial witnesses. The term “protected witness” includes both categories.

23 2. As to *all* protected witnesses, the Government has already and is hereby authorized to
24 continue to redact all identifying information from any materials provided in discovery,
25 provided that it reveals said protected information on the timetable as follows.

26 3. On the schedule set forth below, the Government must, upon written request by a
27 defense counsel, promptly make available unredacted copies of all discoverable materials for
28 inspection by said counsel or said counsel’s investigator (or both) so long as each counsel and

investigator first signs and provides the Government with (i) an acknowledgment that the unredacted information so revealed is protected by this order, (ii) an acknowledgment that each has carefully read and understands this order, and (iii) an agreement to abide by this order fully with respect to all such protected information, keeping in mind that protected information includes not only the information learned during the review but any other information learned from any source about a protected witness. The prescribed form of the acknowledgment is appended hereto. Once all counsel and all investigators for a defendant have provided the acknowledgments and agreement, they shall be “eligible” to receive protected information. Such counsel and investigators will sometimes be referred to herein as an “eligible defense team.” Where a defendant has two counsel, both (and any investigators) must execute and provide the acknowledgments and agreement to be eligible. An original-ink signature on each acknowledgment form shall be promptly filed with the Court, in addition to the usual e-filed version. To the extent that counsel is already in possession of unredacted materials obtained from the United States Attorney, each counsel and investigator must execute (i) an acknowledgment that the unredacted information so revealed in those materials is protected by this order, (ii) an acknowledgment that each has carefully read and understands this order, and (iii) an agreement to abide by this order fully with respect to all such protected information, keeping in mind that protected information includes not only the information learned during the review but any other information learned from any source about a protected witness.

4. The location of the inspections shall be in the United States Attorney’s Office. The unredacted set for inspection shall remain in the room used for the inspection. It shall be bates numbered to correspond to the earlier-produced redacted versions. Defense counsel and their investigators may each make notes from the unredacted set but may not make photocopies of the unredacted set or any part thereof. Nor may they photocopy any notes made by any of them. In other words, no defense team will be provided unredacted materials to take away from the review room and notes made by them may not be photocopied or reformatted as a typed or computerized document. Counsel and their investigators may bring their redacted copies to the place of inspection to assist in their review (but any notes made thereon shall convert said

1 materials to noncopyable notes under this order). They may attend alone or together or in
2 subsets as they wish but each one attending must first have executed the acknowledgments and
3 agreement. Within **SEVEN CALENDAR DAYS** of the review, a list of all protected individuals
4 disclosed in the materials or whose names appear in the materials obtained by subpoena or other
5 means shall be prepared by the defense counsel and provided to the Government. If the latter
6 believes the list is incomplete, it shall promptly seek the Court's intervention.

7 5. The timing of the inspections shall be as follows. As to secondary witnesses, the
8 government must grant an inspection to any eligible defense team within two weeks of a written
9 request accompanied by the proper acknowledgment forms. Such requests may be made
10 effective immediately. As to primary witnesses, upon written request, the government must
11 grant a review to any eligible defense team but only **NINETY DAYS** before the commencement of
12 trial and only as to eligible defense teams whose clients are set for trial within the ninety-day
13 period (and not as to any defense teams set for any, later severed trial). Documents made
14 available for the secondary-witness inspection need only be those relating to secondary
15 witnesses and the portions thereof, if any, relating to primary witnesses may remain redacted.
16 For *all* protected witnesses, locator data shall always remain redacted unless, upon noticed
17 motion and for good cause, the Court approves unredacting such information on a case-by-case
18 basis. To the extent defense teams learn locator data on through subpoena or other means, it
19 shall be protected information under this order.

20 6. All eligible defense teams receiving any protected information, from whatever
21 source, must maintain it in strict confidence and may disclose it and use it only as follows and
22 in no other manner:

23 (a) Protected information may be disclosed to the United States Attorney's
24 Office and to the Court (under seal) and may be used at trial. If fewer than all defense teams are
25 eligible as to the information contained in any such filing, then the filing shall be served only on
26 eligible counsel (and the Government) and the ineligible counsel shall be served with a
27 sanitized copy.
28

1 (b) Protected information may be shared with other defense teams eligible as to
2 the witnesses involved but only to arrange joint interviews and to memorialize follow-up
3 interviews, provided that (specific) locator information shall not be disclosed in any
4 memorandum, letter or other writing. Any shared work permitted under this subparagraph and
5 containing protected information must prominently be labeled on each page “**CONTAINS**
6 **PROTECTED INFORMATION PROTECTED UNDER COURT ORDER; ONLY ELIGIBLE**
7 **RECIPIENTS MAY HAVE ACCESS.**” The disclosing party shall verify in advance that each
8 recipient is eligible. No ineligible party shall receive protected information.

9 (c) Defense teams may use protected information to locate publicly-available
10 information about any subject witness, *i.e.*, a potential trial witness whose identity is unredacted
11 or otherwise revealed. If this leads to other unprotected sources of information on the subject
12 witness, public or private, counsel and/or investigators may interview those unprotected sources
13 about the subject witness. Any information so learned shall be deemed protected information
14 under this order.

15 (d) Defense teams may use protected information to frame questions to
16 interviewees. In interviewing anyone other than the subject witness or in consulting
17 publiclyavailable data sources, however, defense teams shall make no reference to any police
18 report or other government-disclosed document containing protected information, the fact that
19 any potential witness has spoken to law enforcement, the possibility that any potential witness
20 may be cooperating with authorities or is not cooperating with the defense, or the extent to
21 which another’s testimony might help or hurt the defense or prosecution, or any need to obtain
22 impeachment material on a witness, all of which would be unnecessary and unprofessional at all
23 events. Nor shall the police report or other document be displayed or be visible during said
24 inquiry. Rather, defense teams can explain their purpose by simply stating that they represent a
25 defendant in this case and are tracking down a lead to a possible witness and/or seeking
26 information about the subject witness. Any information learned during any such interview is
27 protected information. Counsel and investigators shall never disclose (specific) locator
28

1 information on a subject witness to anyone other than eligible defense teams, the Court, and the
2 Government.

3 (e) Defense teams, however, may use protected information to frame questions
4 to interview a subject witness, *i.e.*, a witness whose comments are set forth in a report. In
5 interviewing a subject witness, a defense team may reveal the relevant report (including the
6 relevant remarks), inquire as to what was said to the police or agent and the circumstances of
7 any remark, and inquire into any other matters bearing upon the witness's potential testimony or
8 bias. Defense teams may assure such witnesses that the report was received legitimately via
9 this protective order and that the defense is restricted in their use of the information. In such an
10 interview, counsel and the investigators shall not disclose protected information *about someone*
11 *other than the subject of the interview* but may inquire, by name, as to whether another person
12 was present or as to his actions or as to his conduct. Any information so learned shall be
13 deemed to be protected information.

14 (f) Defense teams shall not disclose any protected information to any defendant
15 except as follows in this subparagraph. Defense teams may continue (as they are already
16 allowed to do) to provide information to their respective clients as revealed in materials thus far
17 produced; for example, if counsel believes it is necessary for an effective defense, counsel may
18 already disclose to a defendant the substance of police reports provided in discovery, including
19 comments by witnesses, since identifying information has already been redacted. Similarly,
20 new information about a protected witness' possible testimony or impeachment thereof may be
21 disclosed to a defendant, if and when necessary for an effective defense, so long as no
22 identifying information is disclosed and so long as the revelation will not suggest in any way
23 the possible identity of the protected witness or his or her family. Identifying information on
24 protected witnesses can be disclosed to defendants, directly or indirectly, only within **TWENTY-**
25 **ONE DAYS** of the date the particular defendant is set for trial and even then only if defense
26 counsel believes such disclosure is necessary for an effective defense. Specific locator data
27 shall never be disclosed to a defendant unless the alleged crime took place in the witness' home
28 or other location and is clearly relevant.

1 7. Interviews of protected witnesses may be arranged *only* as follows. By letter to the
2 Assistant United States Attorney, one or more eligible defense counsel may ask the government
3 to make one or more protected witnesses available for interviews by eligible defense teams
4 at the federal building. To minimize multiple interviews, counsel shall strive to combine all
5 potential requests as to a particular witness into one or a few interviews, which can be taped if
6 the witness and counsel so agree. Government counsel and agents should not be present except
7 to the extent the witness insists. If no such interview is completed or at least agreed upon
8 within **TWENTY-ONE CALENDAR DAYS** of a written request, then any defense team may contact
9 the subject directly to request an interview, provided that the place and circumstances of the
10 interview and contact shall be chosen to minimize third-party awareness of the involvement of
11 the subject and defense teams must coordinate to minimize contact with protected witnesses.
12 Re-interviews shall be permissible so long as the witness consents to such requests at the first
13 interview. If a subject witness tells any defense team that he or she will not speak to them, no
14 defense team so aware shall make any subsequent attempt to contact the witness, unless the
15 witness makes contact with them on his or her own. The government is not required to arrange
16 an interview, but the government may wish to facilitate such interviews for witness safety.

17 8. All protected information shall be maintained and stored in a secure location by
18 defense teams. No staff shall have access without a prior court order.

19 9. **TWENTY-ONE DAYS** before a defendant's trial commences, the Government shall
20 provide to his defense team, if eligible, a digitized copy or hard copy (at the election of defense
21 counsel communicated reasonably beforehand or, if not, at the election of the Government) of
22 all totally unredacted discovery previously provided in redacted form. Such copies shall be
23 usable at trial in the normal manner. Counsel whose clients are set for a later, severed trial shall
24 *not* have access to the digitized copy until **TWENTY-ONE DAYS** before the later, severed trial and
25 even then only if eligible under this order.

26 10. Once a defense team elects to receive any protected information under this order,
27 then any and all protected information about a protected witness said team subsequently obtains
28 shall be subject to this order. Counsel may *not* argue that the information was learned from

1 independent leads. If counsel have independent leads, then they should consider exhausting
2 them before subjecting themselves to the responsibilities and restrictions of this order.

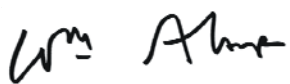
3 11. Counsel are not required to become eligible under this order. They are free to
4 pursue the defense without the benefit of receipt of the protected information under this order.
5 If, however, any such counsel later moves for a continuance based on a ground that would have
6 been mitigated by taking advantage of the earlier access afforded by this order, then such
7 strategic choice and circumstances will be taken into account in ruling on the continuance
8 motion.

9 12. If any ineligible counsel, through inadvertence or otherwise, receives any protected
10 information as to which they are ineligible, then such counsel must report said incident
11 immediately to the Court and the Government. If any counsel or investigator, eligible or not,
12 learns of a probable breach of this protective order, then he or she must immediately notify the
13 Court and the government. This paragraph is binding on all counsel and investigators whether
14 or not they take advantage of this order.

15 13. For good cause, this protective order may be modified by motion of any party with
16 notice given to all other parties.

17
18 **IT IS SO ORDERED.**

19
20 Dated: June 25, 2009.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE